U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0338 BLA

GUY E. WOLFE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLGA COAL COMPANY	)	DATE ISSUED: 05/13/2015
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (12-BLA-05163) of Administrative Law Judge Adele Higgins Odegard rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least fifteen years of underground coal mine employment, and found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] The administrative law judge found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4), and that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

[1] This is claimant's fifth claim for benefits. Claimant's most recent prior claim was denied on February 21, 2006 because, although claimant established the existence of pneumoconiosis, he failed to establish that he is totally disabled from a respiratory or pulmonary impairment. Director's Exhibit 4. Claimant's motion for modification of that denial was withdrawn, and claimant filed the present claim on June 10, 2010.

[2] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this claim, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4)(2012), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

[3] Where a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

On appeal, employer challenges the administrative law judge's weighing of the evidence in finding total disability established at Section 718.204(b)(2) and, thus, argues that the administrative law judge erred in finding that claimant was entitled to invocation of the amended Section 411(c)(4) presumption. Employer also challenges the validity of the implementing regulation at 20 C.F.R. §718.305, and asserts that the administrative law judge imposed an improper standard and erroneously restricted employer's ability to rebut the amended Section 411(c)(4) presumption. Lastly, employer maintains that the administrative law judge's rebuttal findings do not comport with the requirements of the Administrative Procedure Act (APA).[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments regarding the methods of rebuttal and the rebuttal standard applicable to employer.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first contends that the administrative law judge erred in finding that the evidence established total respiratory disability pursuant to Section 718.204(b)(2), and that claimant was entitled to invocation of the amended Section 411(c)(4) presumption. Specifically, employer challenges the administrative law judge's weighing of the blood gas study and medical opinion evidence pursuant to Section 718.204(b)(2)(ii), (iv).[7] At

[4] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the length of claimant's coal mine employment, and her finding that claimant's usual coal mine work was as a fire boss. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 12.

[7] The administrative law judge found that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and that there was no evidence of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 10, 11.

subsection (b)(2)(ii), employer maintains that the administrative law judge relied exclusively on the results of the blood gas studies conducted after the longest duration of exercise to find total disability established, without considering other relevant factors that might have affected the results of the studies. In doing so, employer argues, the administrative law judge arbitrarily "chos[e] the duration of exercise as the sole relevant factor in determining the probative value of the exercise blood gas studies," thereby substituting her own opinion for that of the medical experts. Employer's Brief at 7-12. Finally, employer challenges the administrative law judge's resolution of the conflicting medical opinions of record at subsection (b)(2)(iv), and her determination to credit Dr. Rasmussen's opinion over those of the Board-certified pulmonologists, Drs. Fino and Castle. *Id*. at 10 n.5.

In considering the five blood gas studies of record, the administrative law judge determined that the studies conducted by Dr. Rasmussen on February 8, 2011, January 17, 2012, and September 18, 2012, all produced non-qualifying results at rest and qualifying results post-exercise.[8] Decision and Order at 10-11; Director's Exhibit 16; Claimant's Exhibits 4, 5. The administrative law judge also determined that the blood gas studies conducted by Dr. Fino on June 16, 2011 and by Dr. Gallai on April 14, 2012 produced non-qualifying results, both at rest and post-exercise. Employer's Exhibits 1, 16. Evaluating the conflicting results, the administrative law judge recognized that the regulations "do not require that the exercise portion of an arterial blood gas test continue for a set period of time." Decision and Order at 11. However, in light of claimant's testimony that he walked approximately four to five miles per night as a fire boss, the administrative law judge found the length of time claimant was exercised to be a "relevant consideration, considering the amount of walking" required by claimant's usual coal mine job. Decision and Order at 5, 11, 18-19. Further, she found it relevant that all of claimant's qualifying arterial blood gas test results were obtained "after the longest duration of exercise." Decision and Order at 11. In connection with Dr. Rasmussen's testimony that blood gas testing should last for "at least" 4 minutes, and Dr. Castle's acknowledgment that claimant's values fell with more exercise, the administrative law judge noted that "after 7 or more minutes of exercise, the Claimant demonstrated impairment in oxygen transfer by attaining qualifying PO_2 values." *Id*. Thus, the administrative law judge concluded that claimant established total respiratory disability at Section 718.204(b)(2)(ii).

Contrary to employer's arguments, the administrative law judge acted within her discretion in according greater weight to the qualifying post-exercise blood gas studies conducted by Dr. Rasmussen. As trier-of-fact, the administrative law judge was not

[8] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. *See* 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

bound to accept the opinion or theory of any medical expert, but was required to evaluate the evidence, weigh it, and draw her own conclusions. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). The regulations provide that post-exercise blood gas study results may establish total respiratory disability, and the administrative law judge properly considered all relevant evidence and provided a valid rationale for crediting the qualifying results obtained following exercise of at least 7 minutes' duration over the non-qualifying results of the resting blood gas studies and post-exercise studies obtained following exercise of shorter duration.[9] *Cf. Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Frazio v. Consolidation Coal Co.*, 8 BLR 1-223 (1985); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). Employer's assertion that the administrative law judge "gave no explanation or reason" for crediting Dr. Rasmussen's opinion over those of the Board-certified pulmonologists of record is belied by her specific finding that "[a]lthough Dr. Rasmussen is not a Board-certified pulmonologist, his hearing testimony and curriculum vitae establish that he also has significant experience and training regarding pulmonary diseases." Employer's Brief at 10; Decision and Order at 19. Because the administrative law judge found that all of the physicians were "well-qualified" to offer disability opinions, she permissibly declined to "distinguish between the physicians' opinions based on their credentials." Decision and Order at 19; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993). We reject employer's assertion that the administrative law judge improperly substituted her own opinion for those of the medical experts; rather, in view of the walking requirements of claimant's fire boss job, the administrative law judge permissibly based her resolution of the conflicting blood gas study evidence on the qualifying exercise studies of about 7 minutes' duration, and Dr. Rasmussen's opinion that claimant's testing produced reliable qualifying exercise values demonstrating total respiratory disability.[10] Decision and Order at 11; Employer's Exhibit 7 at 9, 24-28, 35.

[9] While employer asserts that the administrative law judge "arbitrarily" focused on the duration of the exercise blood gas studies and failed to discuss "other factors such as type of exercise, speed and grade on those tests that utilized a treadmill for exercise, or heart rate at peak exercise," Employer's Brief at 9, 14, an administrative law judge is not authorized to determine the significance of such factors independent of a physician's explanation of how such factors may affect the test results. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Here, the administrative law judge accurately summarized the conflicting opinions on the issue of total respiratory disability and the physicians' discussions regarding the various test results obtained, and exercised her discretion in determining the respective credibility of the opinions. Decision and Order at 11-17; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997).

[10] By comparison, the administrative law judge found that while Dr. Castle acknowledged that claimant's testing values fell with exercise, Dr. Fino failed to discuss the significance of the duration of the exercise portions of claimant's blood gas testing. Decision and Order at 15, 20; *see also* Employer's Brief at 20.

As the administrative law judge noted, Dr. Rasmussen testified that he prefers arterial blood gas testing that lasts for at least 4 minutes in order to guard against the occurrence of a "false positive" drop in PO_2 early in the testing procedure. Decision and Order at 11; Employer's Exhibit 7 at 23-25. Dr. Rasmussen explained that "we like to [] do a sample during the fifth minute, then every two minutes thereafter, and we push the patient basically as far as he can go and do samples along the way and we very very typically see progressive abnormalities." *Id*.

We also reject employer's argument that the administrative law judge "adopt[ed] a previously unknown" reliability standard for exercise blood gas studies without advance notice to the parties," and inconsistently applied this standard to Dr. Gallai's test results, in violation of employer's due process rights and the requirements of the APA. Employer's Brief at 12-14. Contrary to employer's assertion, the administrative law judge's acknowledgment that Dr. Gallai's exercise testing lasted 4.5 minutes, "just exceed[ing]" the exercise period of at least 4 minutes advocated by Dr. Rasmussen, did not constitute a new evidentiary standard. *See* Employer's Exhibit 7 at 24; Decision and Order at 20 n.20. Rather, the administrative law judge permissibly evaluated the probative value of Dr. Gallai's test results, which lasted 4.5 minutes, as compared to the probative value of Dr. Rasmussen's test results, which lasted at least 7 minutes, in light of her determination that the duration of testing was a relevant factor in this case.[11] As substantial evidence supports her finding of total disability at Section 718.204(b)(2)(ii), it is affirmed.

Addressing the issue of total disability at Section 718.202(b)(2)(iv), the administrative law judge considered the opinions of Drs. Castle,[12] Fino,[13] and

[11] The administrative law judge noted the "brevity" of the blood gas exercise testing period conducted by Drs. Fino and Gallai, at 2 minutes and 4.5 minutes, respectively. *See* Decision and Order at 10, 20.

[12] Dr. Castle assessed a mild to moderate airways obstruction, attributed claimant's PO_2 values to cardiac disease, and opined that, from a pulmonary standpoint, claimant could perform his last job as a federal mine inspector, although his cardiac condition would prevent him from returning to work. Employer's Exhibit 18.

[13] Dr. Fino opined that claimant has no impairment in oxygen transfer, and assessed a mild obstructive impairment on pulmonary function studies. He opined that claimant's pulmonary impairment from any cause is not significant enough to prevent him from performing his usual coal mine work as a federal mine inspector. He diagnosed legal pneumoconiosis, but stated that claimant's smoking history was of greater significance to claimant's obstructive impairment. Employer's Exhibit 19.

Rasmussen.[14] She assigned little weight to the opinions of Drs. Castle and Fino, that claimant is not disabled from a respiratory standpoint, because they relied, incorrectly, on the exertional requirements of claimant's work as a federal mine inspector, rather than on the more arduous requirements of his usual coal mine employment as a fire boss. Decision and Order at 15, 17-20; Employer's Exhibits 18 at 20, 43, 19 at 9-10, 25; *see Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999); *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Navistar, Inc. v. Forester*, 767 F.3d 638, 25 BLR 2-659 (6th Cir. 2014); *Heavilin v. Consolidation Coal Co.*, 6 BLR 1-1209 (1984). As a medical opinion assessing total disability may be discounted where the physician lacks an accurate understanding of the exertional requirements of claimant's relevant work duties, the administrative law judge's weighing of the evidence was rational. *See Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). Additionally, she found that Dr. Castle's opinion, that claimant does not have a totally disabling pulmonary impairment under the Department of Labor (DOL) guidelines, failed to account for the three qualifying post-exercise blood gas study results. By comparison, she found that Dr. Rasmussen "had a strong grasp of the various tasks required of claimant as a fire boss," and assigned his opinion "significant weight." Decision and Order at 17, 20. As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the qualifying blood gas study results and Dr. Rasmussen's medical opinion are entitled to determinative weight and are sufficient to establish total respiratory disability under Section 718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-196 (1986). As the administrative law judge found total disability established, we affirm her finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), and is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

Turning to rebuttal, employer contends that the administrative law judge improperly limited its ability to rebut the amended Section 411(c)(4) presumption by restricting employer to the statutory methods of rebuttal applicable to the Secretary of Labor. Employer's Brief at 22-28. Employer's arguments are substantially similar to those that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4

[14] Dr. Rasmussen, who diagnosed clinical and legal pneumoconiosis, and chronic obstructive pulmonary disease (COPD) from cigarette smoking and coal dust exposure, identified claimant's usual coal mine employment as a fire boss, which involved heavy labor to very heavy manual labor, including walking, crawling, some heavy lifting, setting pumps, and occasionally shoveling hazardous materials. Dr. Rasmussen assessed a "marked loss in lung function as reflected principally by his impairment in oxygen transfer during light exercise," and opined that claimant does not retain the pulmonary capacity to perform his regular coal mine work. Employer's Exhibit 7.

(2011), *aff'd sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring), and we reject them here for the reasons set forth in that decision. Moreover, as the Director notes, employer "lost not because the [administrative law judge] impermissibly limited its rebuttal evidence, but because the [administrative law judge] found [that the] rebuttal evidence lacked credibility." Director's Brief at 2-3. We conclude, therefore, that employer has not shown that it was, in fact, restricted in the evidence it offered in rebuttal.

Employer additionally challenges the validity of 20 C.F.R. §718.305, the regulation implementing amended Section 411(c)(4), specifically subsection (d), arguing that it conflicts with the statute and the decision of the United States Supreme Court in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Employer further maintains that the appropriate legal standard for establishing rebuttal of the amended Section 411(c)(4) presumption of disability causation is for the party opposing entitlement to show that pneumoconiosis is not a substantially contributing cause of the miner's disability, rather than the standard at 20 C.F.R. §718.305(d)(1)(ii), i.e., that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. Employer's Brief at 29-39. Contrary to employer's arguments, however, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the regulation at 20 C.F.R. §718.305 does not conflict with the *Usery* decision, but constitutes a reasonable exercise of agency authority applicable to any party opposing entitlement, including coal mine operators. *W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *see also Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, BLR (Apr. 21, 2015)(Boggs, J., concurring and dissenting)(holding that, in order to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii), the party opposing entitlement must affirmatively establish, with credible proof, that no part, not even an insignificant part, of the miner's pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis). For the reasons set forth in *Bender*, we reject employer's arguments to the contrary.

Lastly, while employer does not challenge the administrative law judge's finding that the weight of the evidence does not rebut the presumed fact of pneumoconiosis, both clinical and legal,[15] employer contends that the limited rationale provided by the

[15] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

administrative law judge in finding that Dr. Castle's opinion did not rebut the presumed fact of disability causation at Section 718.305(d)(1)(ii) is irrational and does not comport with the requirements of the APA. Employer's Brief at 18-21. We disagree.

In evaluating the evidence relevant to the issue of disability causation, the administrative law judge incorporated her findings on the issue of legal pneumoconiosis, recognizing that the medical opinions "greatly conflict on the topic of whether the Claimant's drop in PO_2 during his arterial blood gas testing was due to coal dust exposure." Decision and Order at 32. The administrative law judge discounted Dr. Castle's opinion, that claimant's impairment was due to cardiac disease developed subsequent to his evaluation of claimant, with possible contribution by ventilation/perfusion mismatching, in favor of Dr. Rasmussen's opinion, that claimant's demonstrated gas exchange abnormality was due to pneumoconiosis and smoking, and that cardiac disease does not cause exercise hypoxia. Decision and Order at 33; Employer's Exhibits 7, 18. The administrative law judge permissibly found that Dr. Castle's opinion was "speculative and unpersuasive" because claimant's medical treatment records do not document cardiac issues, and he failed to account for the qualifying arterial blood gas testing results "both before and after the heart-related diagnosis." Decision and Order at 33; *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19 (2003). By contrast, the administrative law judge found that Dr. Rasmussen's opinion was more persuasive, as the physician explained that claimant exhibited the typical pattern observed in coal miners with gas exchange impairment considerably in excess of ventilatory impairment, and stated that claimant's cardiac function was "quite normal" during the exercise portion of his September 2012 testing. *Id.*; Employer's Exhibit 7 at 28. As the administrative law judge specifically examined, and rejected, Dr. Castle's rationale for attributing claimant's disabling oxygenation impairment to cardiovascular disease, and identified reasons why she found Dr. Rasmussen's opinion more probative, employer's recitation of Dr. Castle's findings and testimony fails to demonstrate error in the administrative law judge's rebuttal analysis, but essentially seeks a reweighing of the evidence, which is beyond the scope of our review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge's decision comports with the requirements of the APA and substantial evidence supports her findings, we affirm her conclusion that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, and we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge